

financial hardship. All of the circumstances taken as a whole did not constitute special circumstances.

Formal decision

The AAT affirmed the decision under review.

[K.deH.]

[Contributor's note: Although similar to the position taken in Secretary, DFACS & Woolrich 4(7) SSR 87 about not 'going behind' consent orders, the same member has gone further here in expressing reservations about doing so in cases where the economic loss component is detailed in the order.]

Federal Court

Compensation: special circumstances

SECRETARY TO THE DFACS v
EDWARDS
(Federal Court of Australia)

Decided: 16 November 2000 by
Drummond J.

The Department appealed against an AAT decision that special circumstances applied to Edwards so that a lump sum compensation payment paid to him should be disregarded.

The facts

Edwards was 32 years old and had been receiving a disability support pension since 1989 for schizophrenia. In September 1996 Edwards was knocked off his bike and suffered physical injuries. In July 1999 he settled his claim for compensation for \$27,500 from which he paid health and legal costs. Centrelink imposed a preclusion period of 32 weeks from the date of the accident, meaning that Edwards was precluded from receiving the disability support pension until April 1997. Centrelink proceeded to recover from the insurer the equivalent to the disability support pension paid to Edwards during that period, a sum of \$6369.30.

The SSAT decision

The SSAT decided that there were special circumstances and that the amount should not be recovered. Those circumstances were that there was no causal connection between the reason Edwards received the disability support pension and the reason he was paid compensation, and only a minor portion of the damages was for economic loss. Any economic loss would be in the distant future.

The AAT decision

The AAT agreed that there were special circumstances. Edwards had only been employed for a short period as a gardener and his chances of ever being employed again were minimal. He suffered no past economic loss.

The law

Section 1163(9) of the *Social Security Act 1991* (the Act) deals with whether there needs to be a connection between the reason for the compensation payment and the reason for payment of the social security benefit.

1163.(9) This Part operates in certain specified circumstances to affect a person's compensation affected payment because of compensation received by the person or the person's partner. This Part is not intended to contain any implication that, in addition to those specified circumstances, there needs to be some connection between the circumstances that give rise to the person's qualification for the payment and the circumstances that give rise to the person's or the partner's compensation.

Section 1184(1) provides that if there are special circumstances the whole or part of the compensation payment may be disregarded. Section 1184(2) then provides:

1184.(2) If:

- (a) a person receives or claims a compensation affected payment; and
- (b) the person's partner receives compensation; and
- (c) the set of circumstances giving rise to the compensation are not related to the set of circumstances that give rise to the person's receipt of or claim for the compensation affected payment;

the fact that those 2 sets of circumstances are unrelated does not in itself constitute special circumstances for the purposes of subsection (1).

Special circumstances

Drummond J found that the purpose of the 'Compensation Recovery' part of the Act was clear.

It is to prevent a person receiving certain kinds of social security benefit when they are also entitled to receive compensation ... only if the compensation is partly or wholly in respect of lost earnings or lost earning capacity.

(Reasons, para. 9)

There was no requirement for there to be a connection between the person's entitlement to a social security benefit and their entitlement to compensation.

The Court analysed s.1163(9) and stated that the subsection made it clear that a person's entitlement to social security will be affected by a compensation payment:

Without regard to whether there is some connection or causal relationship between the person's pensionability and his or her compensability ... in determining whether circumstances have arisen which invoke the operation of Part 3.14 in relation to compensation payments received by a pensioner, whether such a relationship exists is an irrelevant consideration.

(Reasons, para. 15)

However, this does not mean that this circumstance cannot be taken into account when considering special circumstances.

Section 1184(2) identifies a particular circumstance and then directs how that is to be dealt with when applying s.1184(1). That circumstance is:

That there is no causal relationship between the facts giving rise to the partner's receipt of compensation and the facts giving rise to the pensioner's receipt of the social security payment ... s.1184(2) directs the Secretary that it 'does not in itself constitute special circumstances for the purposes of sub-section (1)' [emphasis added]

(Reasons, para. 18)

That is, s.1184(2) acknowledges that the lack of connection is a relevant

consideration, but that it alone cannot amount to special circumstances.

The Department argued that it was irrelevant that there was only a remote possibility that Edwards would work in the future. Drummond J found this to be a relevant consideration because the fact that it was unlikely Edwards would suffer an economic loss in the future meant that he had a 'windfall' of the economic loss component of the compensation payment. It was an error by the AAT to take this into account when considering special circumstances. However this was an error of fact and not law, and thus not reviewable by the Court. An error of law would occur where a Tribunal:

In the course of finding the facts, takes into account considerations which, in accordance with the test in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40 can be said to be irrelevant to the proper performance of its function, that error in how the Tribunal has gone about finding the facts will be an error of law.

(Reasons, para. 25)

In this case Edwards had received compensation for an economic loss that he was unlikely to suffer. This militated against the application of s.1184(1) in his favour. The AAT correctly identified the circumstance as relevant. It then incorrectly applied the circumstance when considering whether special circumstances applied. This was an error of fact not law.

Formal decision

The Federal Court dismissed the appeal.

[C.H.]

Jurisdiction: reviewable decision

**MESCHINO v SECRETARY TO
THE DFaCS**
(Federal Court of Australia)

Decided: 6 February 2001 by
von Doussa J.

The AAT had decided that it did not have jurisdiction to review a decision to refer the recalculation of Meschino's entitlement to family payment to an authorised review officer (ARO). Meschino appealed to the Federal Court arguing that this was a decision that was reviewable by the AAT.

The facts

In June 1999 Meschino had settled a claim before the AAT concerning his en-

titlement to family payment. The Consent Order stated that Meschino was to be paid 50% of family payment between February and May 1988. Centrelink paid Meschino but he complained that the payment had not been calculated correctly. The original decision maker reviewed that decision and affirmed it. Meschino requested a review of this decision. His file was forwarded to an ARO and Meschino was advised of this action. In August 1999 the ARO decided that the basis for the calculation was correct although a minor arithmetic error had been made.

Meschino argued that he needed to request and then consent to a decision being reviewed before the ARO could consider it. A second ARO then reviewed the decision to refer the decision concerning the calculation of the rate of payment to the first ARO. The second ARO decided that he had no jurisdiction to review that decision.

Meschino then requested review by the SSAT of the decision to forward his file to an ARO without his authority. The SSAT reviewed the decision and affirmed it, so Meschino requested review by the AAT.

The law

Section 1239(1) of the *Social Security Act 1991* (the Act) states that the Secretary may review a decision made under the Act if satisfied that there is sufficient reason to do so. Section 1240(1) provides that a person affected by a decision under the Act may apply to the Secretary for review of that decision. The person must be given notice of the reviewed decision and has the right to request review by the SSAT and ultimately the AAT.

'Decision' is defined in s.23 as having the same meaning as in the *Administrative Appeals Tribunal Act 1977*, which includes:

(g) doing or refusing to do any act or thing.

The decision under review

According to von Doussa J the two methods of reviewing decisions were not mutually exclusive. The SSAT appeared to treat the second decision as a review under s.1239. The AAT defined the issue as whether the decision to refer the matter to an ARO was a reviewable decision. The Court found that the referral was made under s.1240.

Meschino applied to the SSAT for review of the decision by the second authorised review officer that he did not have jurisdiction to review the decision about referring the calculation decision for review. The SSAT stated that it had jurisdiction to review this decision. The

Court expressed some reservation about this conclusion because the ARO had not made a decision under s.1243(1) as required, before the SSAT could conduct a review. The SSAT affirmed the decision on the basis that the referral was an administrative decision that Meschino had insisted be reviewed.

Before the AAT Meschino argued that the referral was not a 'decision', and the AAT agreed with him. According to Meschino the referral prevented him requesting review under s.1240 and providing more information on why he thought the decision was wrong.

The Court referred to the High Court decision of *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 where it was held:

That for a determination to be a reviewable decision it would generally, but not always, entail a decision required by or authorised by a statute which is final or operative and determinative, at least in a practical sense, of the issue of fact falling for consideration.

(Reasons, para. 25)

The meaning of 'decision' has to be determined by reference to the text, scope and purpose of the statute. It is not confined to a final decision disposing of the controversy between the parties. The High Court had found that acts done in preparation of making a decision were not 'decisions'.

The Act does not specifically require a 'decision' to be administrative in character or to be made under an enactment. However the review procedures are in that part of the Act dealing with the administration of the Act. The referral to the ARO was an administrative step. The powers of review are exercised in respect of 'a decision of an officer under this Act'. That is, the decision is similar to a decision under an enactment, and thus the reasoning of the High Court in *Bond* should also apply to decisions under the Act.

The reference of the applicant's file for the review conducted by ARO Cursaro was made for the purpose of an exercise of power under s.1240, the act of referral was in no relevant sense based on a decision by the Centrelink officer to refer the file. The referral was consequent not upon such a decision but upon a request made by the applicant himself ... There is no requirement under the Act that there be a decision to refer a matter to the Secretary or the Secretary's delegate to initiate the review power.

(Reasons, para. 30)

The act of referral was merely an administrative step and required no decision making under the Act and thus was not a 'decision'.